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Conflict of Laws—Law Governing Contract—Constitutional Law

Comment on Recent Decisions

CONFLICT OF LAWS—LAW GOVERNING CONTRACT—CONSTITUTIONAL LAW. —The plaintiff had a fidelity bond with the defendant upon its officers and employees. The contract was entered into in Memphis, Tennessee. Plaintiff's office was removed from Memphis to Scott, Mississippi, where the defalcations of the treasurer occurred. The plaintiff sued upon the bond in Mississippi. The bond provided that claim must be made within fifteen months after the termination of the suretyship for the defaulting employee. The contract covering the treasurer ended December 31, 1929, and the plaintiff did not make a claim until June 22, 1931. The Tennessee law enforces such a provision as a limitation of liability and not a limitation of action. Under the Mississippi law the action is limited and must yield to the statute prescribing a six-year period. Sec. 2294, Miss. Code of 1930 provides: "All contracts of insurance on property, lives or interests in this state shall be deemed to be made therein." The plaintiff's recovery under this statute was affirmed by the Supreme Court of Mississippi. (150 So. 205) *Held:* Reversed on the ground that the statute was applied extraterritorially and consequently the defendant was denied due process of law. *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.* (1934) 54 S. Ct. 634.

What law should be applied to a contract is a question of great uncertainty. Lorenzen, Validity and Effects of Contracts in the Conflict of Laws (1921) 30 Yale L. J. 565, 655; 31 Yale L. J. 53. It is generally said that there are three rules by which to determine the essential validity of a contract: *lex loci contractus, Carnegie v. Morrison* (1841) 2 Metc. (Mass.) 381, the law of the place of performance, *Miller v. Tiffany* (1863) 1 Wall. 298; *Robinson v. Bland* (1760) 2 Burr. 1077, 97 Eng. Rep. 717; Story, Conflicts (8th ed., 1883) sec. 280; the intention of the parties, *Pritchard v. Norton* (1882) 102 U. S. 124. See Goodrich, Conflict of Laws (1927) 218, 228; Beale, What Law Governs the Validity of a Contract (1909) 23 Harv. L. Rev. 1, 79, 194, 260. In the instant case the Court concluded that both the place of making and of performance were in Tennessee. Although the particular result is sound, it is possible to criticize it on the ground that it will enable contracting parties too easily to avoid the state law by crossing the border and executing the contractual formalities in another state. Perhaps a more suitable theory could be worked out upon the basis of the situs of the interest; this could certainly prevent conscious evasion of state law although it would vest much discretion in the courts.

The more fundamental significance of the principal case involves the relation of conflict of laws with constitutional law. See Ross, Has the Conflict of Laws Become a Branch of Constitutional Law? (1931) 15 Minn. L. Rev. 161. Although the Supreme Court has said, in *Kryger v. Wilson* (1916) 242 U. S. 171, that the application of a rule of conflicts is a matter of purely local concern, other cases do not bear this out. Insurance cases have been the ones in which the Court has most easily assumed jurisdiction of a question of conflicts. It is said that no state can exercise any extraterritorial authority because of constitutional inhibitions. *Pennoyer v. Neff* (1878) 95 U. S. 714; see *Allgeyer v. Louisiana* (1897) 165 U. S. 578. Statutory expressions of local policy toward insurance have been invalidated because of conflict with

the due process clause of the Fourteenth Amendment. *New York Life Ins. Co. v. Dodge* (1918) 246 U. S. 357; *Aetna Life Ins. Co. v. Dunken* (1924) 266 U. S. 389; see *Comment* (1925) 38 Harv. L. Rev. 826. The Court also mentioned impairment of the obligation of contract and the full faith and credit clause in *New York Life Ins. Co. v. Head* (1914) 234 U. S. 149. The commerce clause was applied to nullify a telegraph mental anguish statute in *Western Union Tel. Co. v. Brown* (1914) 234 U. S. 542. But see *Fox v. Postal Tel. Cable Co.* (1909) 138 Wis. 648, 120 N. W. 399, where Wisconsin law was applied in a suit for the negligent transmission of a telegram from New York to Chicago. The application of the due process clause is probably preferable in that it is less restrictive upon the courts. The chief value in bringing such cases into the federal courts would be uniformity of conflict rules. See *Note* (1930) 40 Yale L. J. 291. After all, uniformity, rather than the intrinsic superiority of any particular rule, is the real aim of conflict of laws.

N. P., '34.

CONTRACTS—ILLEGALITY—COMPOUNDING FELON.—Plaintiff Insurance Co. seeks to recover $81,014.36, part of the amount paid to the Defendant Bank under a robbery insurance contract. In the contract there was a stipulation that in case of recovery of the stolen items from any source other than insurance or security the net amount, less the actual cost of making the recovery, should be applied to reimburse the insured in full for the loss, and the excess, if any, should be paid to the insurer. Part of the stolen items were recovered as a result of negotiations with the criminals on the part of both the Insurance Co. and the Bank, whereby the robbers received $140,000. The lower Court refused to allow the Insurance Co. a recovery on the grounds that the contract whereby the items were recovered from the robbers, was void as against public policy and *R. S. Mo.* (1929) *sec.* 3894, *Fidelity and Deposit Co. v. Grand National Bank of St. Louis* (D. C. 8, 1933) 2 F. Supp. 666 —commented upon in 18 *St. Louis Law Rev.* 352. The bank's counterclaim based on the expenditure of the ransom money in obtaining the return of the stolen bonds was also held invalid.

The Circuit Court of Appeals reversed the District Court's decision on the grounds that, the ransom contract being completed, and the recovery being based solely upon the insurance contract stipulation, no taint of invalidity from the ransom contract existed which would prevent the Insurance Co.'s recovery on the Insurance contract. *Fidelity and Deposit Co. v. Grand National Bank of St. Louis* (C. C. A. 8, 1934) 69 Fed. (2d) 177. In the light of the provision in the insurance contract (*supra*) and the well established principle of law that an action is maintainable as long as the illegal transaction is not required to establish the cause of action, *Brooks v. Martin* (1864) 2 Wall. 70; *Thompson v. Lyons* (1920) 281 Mo. 430, 220 S. W. 942, it seems that the conclusion reached by the Appellate Court is sound. The substantiating dicta, however, to the effect that the ransom contract itself is not invalid as against public policy in that there is no express or implied agreement to suppress, stifle or stay criminal prosecution as part of the consideration appears to be of doubtful application in the present case.

It is settled principle in American jurisprudence that a civil action may be maintained against a thief to recover stolen property or its value before prosecution. *Downs v. Baltimore* (1910) 111 Md. 674, 76 Atl. 861, 41 L. R. A.